FILE COPY

No. 208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

S. W. RICHARDSON,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner S. W. Richardson prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 17, 1959, (R. 144)[1] together with the underlying decision of that Court dated April 17, 1959. (R. 142). These affirmed the order of the Federal Power Commission (App. 52a) on rehearing (App. 54a) which rejected without hearing Petitioner's application for a certificate of public convenience and necessity, the filing of his underlying gas sales contract as an initial rate schedule, and his request for emergency authorization under Section 157.28(c) of the Commission's Rules and Regulations.

[1] The record certified from the Court below will be referred to as "R"; the Appendix to this petition as "App.".

OPINIONS BELOW

The Federal Power Commission's Order was in letter form dated October 3, 1957. It appears in the record at page 123 as set forth in the Appendix at page 52a. The order of the Commission denying Petitioner's application for reconsideration and the dissent filed therein appear in the record at page 137, and are set forth in the Appendix at page 54a. The opinion of the Court below is reported at 266 F. 2d 233 and is set forth in the Appendix at page 1a, together with other opinions issued the same date, to which it refers.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1959, (R. 144). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254, Sub. 1. 62 Stat. 928 and, the Natural Gas Act, Section 19(b), 15 U.S.C. Sec. 717 r(b).

QUESTIONS PRESENTED

Urged as Reasons for Granting the Writ

1. Does Section 7 of the Natural Gas Act, or a certificate of public convenience and necessity issued thereunder, vitiate the term provision of a producer's gas sales contract and compel continued production and deliveries of gas after the contract's expiration date?

2. Is a new certificate of public convenience and necessity required to make sales of gas pursuant to a new and distinct contract which covers acreage formerly included under an expired agreement? Should such new contract be filed as an initial rate schedule?

3. Can the Federal Power Commission lawfully deny Petitioner a hearing on his application for a certificate of public convenience and necessity based upon a new gas

sales contract covering acreage from which sales had previously been made under an expired agreement by summarily rejecting his application and contract filing?

STATUTES INVOLVED

The relevant provisions of Sections 1, 4, 5, 7 and 19 of the Natural Gas Act of 1938, 52 Stat. 821 as amended, 15 U.S.C. Sec. 717, et seq., are set forth in the Appendix to this Petition (App. 58a), with relevant portions of the Regulations thereunder, and the Commission's Rules of Procedure (App. 66a).

STATEMENT OF THE CASE

This is an appeal from the Commission's summary rejection of Petitioner's application for a certificate of public convenience and necessity to authorize sales and deliveries of gas under a contract between Petitioner and Southern Natural Gas Company (Southern Natural) dated September 16, 1957, and the ancillary rejection of the contract as an initial rate schedule.

(a) Factual Background:

Petitioner entered into a contract with Southern Natural, dated August 26, 1947, covering the sale of gas produced from certain oil, gas and mineral leases in the Gwinville Field Area, Jefferson Davis and Simpson Counties, Mississippi for a term of ten years from the effective date, September 9, 1947, (R. 12). Subsequently, in conformance with the Commission's Order No. 174-A, an application for a certificate of public convenience and necessity (certificate) was filed and assigned Docket No. G-6252 (R. 49). The certificate granted by the Commission's order issued October 24, 1956, provided *inter alia* that it should remain effective

only so long as applicant continued the acts or operations authorized. The contract was filed as an initial rate schedule. Gas deliveries, which had been previously begun on September 9, 1947, continued until Petitioner's contract expired by its own terms on September 9, 1957. Deliveries were then terminated (R. 130).

Petitioner entered into a new contract with Southern Natural dated September 16, 1957. Application for a certificate to make deliveries under this agreement was filed by Petitioner on September 16, 1957, under Docket No. G-13272. Notice was given the Commission that deliveries of gas had been commenced under Section 157.29 of the Commission's Rules and Regulations and temporary authorization under Section 157.28(c) was sought (R. 85, 86).[2]

(b) Action of the Commission:

By order in letter form dated October 3, 1957, issued over the signature of the Secretary, and purportedly under his delegated authority, the Commission rejected without a hearing the application and request for temporary authorization on the ground that the application covered "acreage" previously certificated for sales by Petitioner to the same buyer. Specifically the order stated:

> "Such certificate application covers the acreage of S. W. Richardson in the Gwinville Gas Units Nos. 4, 5, 6, 8, 22 and 29 in the Gwinville Field, Jefferson Davis County, Mississippi, and duplicates the acreage covered by the certificate issued to S. W. Richardson in Docket No. G-6252 for sales to the same buyer, Southern Natural Gas Company. Such previously issued certificate is still applicable to the gas sales from the acreage, even though the term of the gas sales contract, dated

[2] Section 157.28(c) identifies the information which applicant must furnish to qualify for temporary authorization to commence deliveries of gas.

August 26, 1947, (which was incorporated by reference in such certificate application) has expired (App. 52a)."

The Commission also rejected Petitioner's contract filing because it did not conform to the Commission's Regulations, relating to *changes* in existing rate schedules. Petitioner was offered the opportunity to retender the contract as a change of rate in accordance with the requirements of Section 154.94 of the Regulations (App. 66a). He did not, however, make the suggested alternative filing (App. 2a).

Petitioner filed his application for rehearing on October 28, 1957, renewed his certificate application and retendered the 1957 contract as an initial rate schedule (R. 127).

On September 27, 1957, the Commission, with Commissioner Digby dissenting, denied the petition for reconsideration and rejected the second tender of the certificate application and contract, reaffirming its reasons previously given for such rejection. Commissioner Digby dissented from the order, stating that the application should at least have been accepted for filing and set for rehearing (App. 56a). Petition to review under Section 19(b) of the Act was filed January 11, 1958 (R. 1).

(c) Judgment of the Court of Appeals:

The Court of Appeals for the Fifth Circuit, with one judge dissenting, filed its opinion and judgment on April 17, 1959, affirming the order of the Commission. Four other cases involving similar issues were decided by the Court at the same time.[3] While consolidation was refused (R. 7) and separate opinions filed in each of the cases, the majority below held Petitioner's appeal to be controlled by the same

[3] The Sun Oil Company v. Federal Power Commission, No. 17040. Humble Oil & Refining Company v. Federal Power Commission, No. 17128. Hunt Oil Company v. Federal Power Commission, No. 17256; and Magnolia Petroleum Company v. Federal Power Commission, No. 17136.

principles set forth in its opinion in *Sun Oil Company* v. *Federal Power Comm.* (App. 2a) and affirmed the orders of the Commission for the reasons which were there stated. It noted only the factual difference that Petitioner had not made an alternative filing of his new contract as a rate change as had Petitioners in the "companion cases" (App. 2a). Other factual differences which existed were not noticed.

In *Sun* the majority held specifically that the contract of petitioner there did not provide for an initial rate and that therefore no new certificate of public convenience and necessity was proper. It reasoned and held collaterally that the certificate issued to petitioner under Section 7 authorizing sales under the 1947 contract had not lapsed although the ten year term of the agreement had expired; that petitioner could not lawfully terminate deliveries of gas to Southern Natural without Commission approval, that sales under the new contract were "a continuation of service" and the new contract itself, merely a change of rate. It approved summary rejection of the application for a new certificate and contract filing for the stated reason the Petitioner had no "right" to a certificate which duplicated one outstanding and operative, and that where the contract tendered for filing was a nullity as an initial rate filing, the Commission was authorized to reject it without notice and hearing. Reference was made to the Court's opinion filed the same day in *Continental Oil Company* v. *Federal Power Commission*, 266 F. 2d 208 (App. 25a) and the reasons there stated for its holding that Petitioner's sales and facilities were within the scope of Section 7(b) of the Act and could not be abandoned without Commission approval.

Relying in part upon this Court's decision in *United Gas Pipe Line Company* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956), the dissent filed by Judge Brown rejects as illogical

the conclusion that the new contract was merely a "change in rate". It further states that only a producer's sales subject him to the Act. So long as he sells gas in interstate commerce, he is subject to regulation; when the sale is completed, he may withdraw if he chooses. Judge Brown concludes that by misreading Section 7(b) to force continued sales until a reservoir is exhausted the majority unlawfully changes the contract and destroys the last remnant of the exemption of production from Commission jurisdiction provided by Section 1(b) of the Act.

REASONS FOR GRANTING THE WRIT

This case vitally affects all producers of natural gas making interstate sales under certificates of public convenience and necessity. The decision below holds in effect that the term provision in producer contracts is meaningless and that jurisdictional sales once commenced cannot be discontinued without Commission approval. This holding is without statutory authority and is contrary to general language of certificate authorization under which such sales are made.

The burgeoning of gas transmission lines in the last two decades has been supported in part by commitments for gas supplies based on long term agreements, usually for a period of twenty years or more. Petitioner's case comes early to this Court as his agreement provided a ten year term. The great bulk of such contracts, under which producers dedicate and sell gas to pipe line companies, will begin a series of expirations during the next several years.

At the time Petitioner's agreement was made, it was not thought that the selling party was in any manner subject to regulation under the Natural Gas Act. This notion was dispelled by *Phillips Petroleum Company* v. *Wisconsin, et al.*, 347 U.S. 672 (1954). While the regulated producers did not voluntarily assume or accept the burdens of ortho-

dox utility regulation, they *did* have the assurance that the integrity of their private agreements was guaranteed under the Act. *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

The opinion below not only affects those contracts which have been completely performed and destroys the freedom of gas producers to contract for interstate sales for a limited period of time, it has the further effect of erasing from the Act the last vestige of the production and gathering exemption, Section 1(b). There is no reason for this result.

By misconstruction of Section 7 of the Act, the majority determines erroneously that the effective life of the authorizing certificate of public convenience and necessity replaces the term of the producer's privately negotiated agreement. As a result of its decision, the term provisions of thousands of producer contracts scheduled for expiration over the next several years are nullified; sellers are compelled, contrary to contract and express prohibition by the Act, to deliver amounts of gas in excess of those committed. The vehicle for this result is the affirmance of a Commission order which rejected Petitioner's certificate application and contract filing without a hearing. Would hearings be afforded other complainants if this Court sanctions the summary method tried and proven below?

While this result is erroneously said to be in the best interest of consumers, no direct support is found for such in the Natural Gas Act, no economic or practical justification is established for such principle in order to assure efficient administration of the Act, and no historical precedent is shown. In short, the producer having entered upon a most unstable and speculative area of business finds himself confronted with the risk never conceived or assumed —

that he is forced to continue in a regulated business, without right of retirement, during the productive life of his property.

To compound the impact of this case, this Court has said recently in its opinion issued June 22, 1959, in *The Atlantic Refining Company, et al.* v. *Public Service Commission of New York, et al:*

> "Section 7(c) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval." (Folio copy, p. 10)

Although the issue of contract-term expiration was not before the Court, was not briefed, argued, or urged, this statement will undoubtedly become the subject of grave misconstruction when applied to the thousands of expiring producer contracts. A matter of such basic and wide sweeping concern deserves detailed consideration by this Court, and requires its interposition by writ of certiorari.

ARGUMENT

The ten year term of Petitioner's first contract with Southern Natural expired September 9, 1957. The valves controlling the flow of gas from Petitioner's delivery point were closed and physical deliveries to Southern Natural were discontinued (R. 139). A new agreement was negotiated with the same purchaser for a twenty year term at a higher rate. Upon its execution, deliveries were commenced and emergency authorization requested. The majority below held that the new contract represented a "renewal" agreement and a continuation of service and sought merely to effect a "change" in rate. It reasoned that the effective

term of the certificate of public convenience and necessity authorizing sales under the expired contract was unlimited except as measured by Section 7(b) of the Act. The term of the certificate, therefore, replaced the term of the contract; and as Petitioner was compelled to continue sales, there was no warrant for a "second" certificate based upon an initial rate.[4] It is this rationale which brings the issue clearly into focus.

I.

THE COURT BELOW HAS DECIDED ERRONEOUSLY THAT SECTION 7 OF THE ACT ABROGATES THE TERM PROVISIONS OF PRODUCER CONTRACTS AND COMPELS CONTINUATION OF SALES AFTER THE EXPIRATION OF SUCH AGREEMENTS.

(a) Term of Petitioner's Contract Not Extended by Initial Certificate Issued Him Nor by Section 7(b) of the Act:

Under the compulsion of the Commission's Order 174-A, Petitioner, in November of 1954, applied for a certificate of public convenience and necessity to authorize sales of gas then being made to Southern Natural under the 1947 Agreement (R. 49). This agreement, which expired by its own terms on September 9, 1957, was filed as a rate schedule pursuant to applicable Commission Regulations (R. 9). On October 24, 1956, a certificate was issued which provided *inter alia* that it

> "• • • shall be effective *only so long as applicant continues the sales or operations hereby authorized in accordance with the Natural Gas Act*, and the applicable rules, regulations and orders of the Commission." (R. 61, emphasis supplied)

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[4] The sales price under the expired agreement at the date of its expiration was 8c per Mcf of gas; under the new agreement it was 20c per Mcf of gas.

The majority attached controlling significance to the certificate "term", whether it was specially limited or continuing. The initial certificate authorization was required to be co-terminal with the underlying agreement; but putting this aside, it could not, under the circumstances of its issuance, have the effect attributed — modification of the contract term.

Section 7 of the Act requires the issuance of certificates of public convenience and necessity before jurisdictional sales can be commenced. Specifically, it provides:

> "(c) No natural-gas company * * * shall engage in the * * * sale of natural gas, subject to the jurisdiction of the Commission * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: * * *"
>
> * * * *
>
> "(e) * * * a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the * * * sale * * * covered by the application if it is found that the applicant is able and willing to do the acts and to perform the service proposed and to conform to the provisions of this chapter. * * * and that the proposed * * * sale * * * is or will be required by the present or future public convenience and necessity * * *."

The Commission is thus delegated authority to examine and review the *proposed* sale and issue certification if such sale is required by the public convenience and necessity. This is the certificate; it is permissive, not contractual in character. *Skelly Oil Company* v. *Phillips Petroleum Co.* (CA 10, 1949), 174 F. 2d 89, reversed on other grounds, 339 U.S. 667. While such certificate was required for continued sales under the 1947 Contract, it did not contain language nor have statutory influence to lengthen, destroy, or otherwise affect the contract term.

Admittedly private contracts are made subject to paramount regulatory authority, but Section 7 of the Act contains no prohibition of term commitments by producers of natural gas. In its Procrustean application of that Section, the majority below disregards the rule of *Mobile*, which recognized the integrity of private contracts and their stature under the Act. Instead, it attempts to apply the decision in *Sunray Mid-Continent Oil Company v. Federal Power Commission*, 353 U.S. 944 (1957), a case wholly alien to the issues made here.

The controlling importance of contracts, in light of the regulatory scheme envisioned by the Act, was clearly stated in *Mobile*:

> "In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. * * *
>
> "By preserving the integrity of contracts, it permits the stability of supply arrangements, which all agree is necessary to the health of the natural gas industry * * *. [T]he Natural Gas Act permits the relationship between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public. * * * The Natural Gas Act * * * recognizes the need for private contracts of varying terms and expressly provides for the filing of such contracts as a part of the rate schedules. * * *." (350 U.S. at 338, 339, 344, 345.)

Specifically, *Mobile* held that a contract for a fixed rate for a fixed term could not be unilaterally abrogated by a notice filing under Section 4 of the Act. Such change, either by one of the parties to the agreement or by the Commission, could be made only pursuant to hearing and appropriate findings under Section 5 of the Act. Contractual undertakings once fixed by the parties and accepted for

filing by the Commission are subject to change, therefore, only by mutual consent (with Commission review) or by hearing and the determination of unreasonableness which Section 5 requires.

While *Mobile* dealt with the application of Sections 4 and 5 of the Act to private contracts, it is no less applicable to Section 7. Quite apart from altering contracts, Section 7, like Sections 4 and 5, recognizes the power of the parties to agree initially and submit their agreements to the Commission for review. No contracting power is given the Commission. If the sale (or service) "proposed" or "any part" thereof is in the public convenience and necessity, a proper certificate will issue. If not, authorization will be denied. The Court below made much of the argument that the "authorization of the certificate is not only for the sale of gas pursuant to the contract but pursuant to and subject to the provisions of the Act" (App. 9a). This is so, but, the provisions of the Act (Section 7) limit the certificating powers of the Commission to a sale (or service) "proposed". Here, the sale (or service) proposed was the 1947 Contract, and no more.

Like other producer applications relating to gas sales, Petitioner's application for certificate was referrable and limited to the sales covered by the 1947 Contract. The certificate was issued under Commission rules authorizing the granting of the "authority requested" by the application.[3] Section 1.32, Commissions Rules of Practice, and

[3] The Commission has been held without power under Section 7(a) to order an extension of facilities where the result will be to compel additional production. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* (CA 3, 1953) 204 F. 2d 675. The decision below, having the effect of compelling the prohibited increase in gas quantities deliverable under a contract by extending its termination date, was clearly contrary to the statute. It ironically holds that in this situation the Commission is empowered to escape limitations imposed by Section 7(a) and 7(e) via its Section 7(b) control of "abandonment" of service.

purported only to cover the sales described in the application and exhibits (R. 76). It was thus limited to the 1947 Contract and lapsed upon its expiration.

Apparently the court below believed that this Court's holding in *Sunray* was authority to the contrary. It reasoned erroneously that since the original certificate was not expressly limited, it continued in effect and covered Petitioner's sales to Southern Natural under the 1957 Agreement. Any new or further sales could only be a "continuation of service"; and any new rate agreement could only be a "change in rate".

Sunray, of course, held no more than that the Commission had adequate powers under Section 7 to issue certificates of specially limited duration. It is neither authority for the holding that Petitioner's certificate was unlimited nor for the implication made that where there is an existing certificate any new contract between parties following an expired agreement and providing for different sales price can only be for the continuation of service at a change in rate. Aside from being laid on the false premise that Petitioner's certificate was in effect perpetual, the conclusion that the 1957 agreement was merely a "renewal contract" or a "rate change" does not logically follow.[6]

The term of Petitioner's expired contract was an integral part of the agreement; it was of equal dignity with the other provisions. Having been duly filed and accepted by the Commission, it became inviolable against change, except pursuant to notice and hearing under the review sections of the Act. Until changed in this manner, *Mobile* assures that

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[6] The dissent filed by Judge Brown says: "Except for the imprimatur of this Court which states that it is *law* I do not at all think it follows, either normally or naturally *or necessarily*, that 'upon the *termination* of a contract' a 'new contract between the same parties' is a rate change. To reason from *existing* contract to *new* ones after termination is a non sequitur flying the face of *Mobile*." (App. 16a).

it may be relied upon by the parties and by the public. Section 7 does not prescribe the manner of change approved by the Court below.

(b) Misconstruction of the Language of Petitioner's Certificate:

The majority's error in construing the language of Petitioner's certificate is not immediately discernable from examination of the *Richardson* and *Sun* opinions. While other parties similarly situated may have continued in fact the sale and delivery of gas to Southern Natural after the expiration of their respective agreements, Petitioner did not (R. 160). He discontinued the "acts or operations" authorized by the first certificate by physically shutting off the flow of gas for a period of several days. The certificate provided that it "shall be effective only so long as applicant continues the acts or operations hereby authorized." If the time for expiration is as material as the majority believes, can this have any meaning other than that the certificate expired by its own provisions with the discontinuance of the acts or operations authorized? It is factually inaccurate to say that Petitioner's sales continued.

Neither Petitioner's contract nor the Act forbade discontinuance of gas deliveries to Southern Natural upon the expiration of the 1947 Contract. It is, of course, not contended that the scheme of the Act could be thwarted by unlawfully shutting off gas deliveries and thereby bringing about a premature termination of the authority to continue sales. Unlawful action could not affect, much less enhance, Petitioner's position; but both the certificate and the Act contemplate that the authorization will issue for a particular sale and that it *shall* terminate at some future time. No amount of sophistry can escape this conclusion. Was, then, Petitioner within his legal rights

and acting "in accordance with the Natural Gas Act" when he caused the certificated sales to be discontinued? The majority held that he was required to obtain prior Commission approval, citing its decision in *Continental Oil Co. v. Federal Power Commission* (*supra*) decided the same day (App. 25a).

(c) Section 7(b) of the Act Not Prevent Petitioner from Lawfully Discontinuing Deliveries of Gas After the Expiration of Agreement:

The Court below erroneously held that Petitioner's production facilities were subject to the jurisdiction of the Act and that termination of sales made by means of such facilities was not lawful unless authorized by the Commission pursuant to proper application, finding and order under Section 7(b) of the Act, Petitioner's contract to the contrary notwithstanding. Section 7(b) of the Act as drafted and consistently construed by this Court relates solely to the abandonment of facilities subject to the jurisdiction of the Commission and service rendered by means of such facilities. It provides in part:

> "No natural-gas company shall abandon * * * its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, * * *."

Had Petitioner been afforded a hearing, he would have shown that no such facilities were operated and that he did not, therefore, render any such service referred to in that section of the Act. Even the *Continental* and *Huber*[7] cases, relied on by the Court below, treat the existence of

[7] J. M. Huber Corp. v. Fed. Power Comm. (CA3, 1956) 236 F. 2d 550, Cert. Den. 352 US 971.

jurisdictional facilities as a matter of *fact* proper for determination in the first instance by the Commission. In *Federal Power Commission* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498 (1949), this Court declared in unmistakable language that Section 7(b) did not operate on facilities embraced within the Section 1(b) exemption. Holding that the Commission could not prevent or control the transfer of leases, it said:

> "* * * The argument here is that since natural gas is the 'lifeblood' of a pipe-line system, a company by disposing of its gas reserve, unhampered by Commission control, may render itself unable to continue service; consequently abandonment of facilities and service without the consent of the Commission will result. The argument begs the question. The section, like those above, covers only 'facilities subject to the jurisdiction of the Commission'" (at page 509).

Petitioner operated only production facilities; his deliveries of gas to Southern Natural under the 1947 Contract were made through a separator situated at the well head (R. 15, 52). The original application for a certificate of convenience and necessity was specific in its exclusion of request for authorization to operate such facilities (R. 54). This Court has frequently held certification of producer facilities was not required because of the "production and gathering" exemption of Section 1(b). The holding in *Phillips* was so characterized by the dissent:

> "By today's decision the Court restricts the phrase 'production and gathering' to 'the physical activities, facilities and properties' used in production and gathering" (347 U.S. at page 695).

To like effect are *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 518 (1945); *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682 (1947);

Federal Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).

The necessity of this exemption is apparent from the practical impossibility of the Commission's making routine business decisions on locating, drilling, testing, completing, deepening, reworking gas wells and, if economically necessary, abandoning them and other production facilities. The Commission is neither equipped nor charged with responsibility of acting as a Super Board of Directors, to review the business judgment of its regulated producers in this area. As Petitioner operated only production facilities, his sales under the terminated contract could not involve facilities or service for which he was required to obtain a certificate to place into service or authorization to withdraw from service.[8]

Until the *Continental* and *Sun*, et al, decisions, the Court below had been in accord. In *Deep South Oil Co.* v. *Federal Power Commission* (CA 5, 1957), 247 F. 2d 882, cert. den. 355 U.S. 930, it has said:

> "The exemption of production and gathering facilities merely means that the physical activities, facilities and facilities used by Petitioner in the production and gathering of natural gas are not within the Commission's power of regulation."

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[8] While other sections of the Act relate to "sales" and "service", Section 7(b) applies only to "facilities" and "service". It contains no mention of sales. Attempts to increase its scope to embrace producer sales have failed. Amendment to Section 7(b) was proposed by letter dated June 17, 1955 from Chairman Kuykendall, Federal Power Commission, to the Chairman of the Senate Committee on Interstate and Foreign Commerce, the purpose of which was to make clear "* * * that Commission is authorized to pass upon the proposed abandonment of any sales in interstate commerce for resale by independent producers". See, Hearings, 84th Cong. 1st Sess. on S. 712, et al, pp. 1234, 1235. No such bill was passed. This Court's reasoning in *Phillips* is no less applicable here. 347 U.S. at page 685.

The resulting intracircuit conflict on a matter of such importance is a further compelling reason for the granting of certiorari. *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 508; *John Hancock Mutual Life Insurance Co.* v. *Bartels*, 308 U.S., 180, 181.

(d) Act Adequate as Written:

It is the view of the dissent (shared by Petitioner) that the decision below is born of the majority's apprehension that the Act does not otherwise provide adequate protection for the public. It is argued that producers should not be permitted by contract to dictate the terms and conditions of each certificate issued by the Commission. To obviate this phantom defect, the majority stretches Section 7(b) over what it considers to be a hiatus in the Act. In so doing, it rejects the contract and ascribes to the Commission powers which the Act does not confer. The Act as written is adequate to the occasion.

The Commission is vested with sufficient conditioning powers to interdict at the outset any fictitious agreements — agreements of artificially short duration, or which contain other offensive provisions. If a sale (or service) proposed and evidenced by the contract is not required for the present or future public convenience and necessity, the application should be denied. Section 7 affords the Commission review powers at the initial stage of sales or operations. Sections 4 and 5 in complementary manner provide for review during the course of sales or operations. The Commission's power to condition certificates is recognized as necessary to assure that privately negotiated agreements meet standards of public responsibility. The Commission may, no doubt does, and should, use its conditioning powers to nudge contracting parties gently into

a position consistent with the public interest. Sections 4, 5, and 7 of the Act thus afford a comprehensive scheme of supervision over regulated sales and operations from their inception through their conclusion.

Once the underlying agreement has been reviewed by the Commission, accepted for filing and made public under Section 4, all interested parties may rely on its provisions until they are changed in the manner prescribed by the Act. Having once committed himself by contract to serve for a particular period of time or on particular terms, an applicant would be prevented by Sections 4 and 5 from terminating without just cause the sales and services assumed by him. Likewise, mutual consent to change between parties, such as subsequent shortening of the contract term, would be inoperative until notice was given under Section 4 and Commission review, if determined to be necessary, was obtained. To hold as the court below has, that Section 7 of the Act eradicates the term provision from a private contract which has been accepted and performed to conclusion, creates a conflict between Sections 7 and 5 and disrupts efficient administration under the Act.

II.

PETITIONER WAS WRONGFULLY DENIED THE HEARING ON HIS CERTIFICATE APPLICATION GUARANTEED BY SECTION 7 OF THE ACT.

Express provision is made in Section 7(c) to assure hearings on applications for certificates. The language of that Section is mandatory. Upon the filing of an application, the Commission "shall set the matter for hearing". Attempts to shortcut this requirement have consistently failed. Cf. *Mississippi River Fuel Corp.* v. *Federal Power*

Commission (CA 3, 1953) 202 F. 2d 899, pet. for cert. dis'm. 345 U.S. 985; *Northeastern Gas Transmisssion Co.* v. *Federal Power Commission* (CA 3, 1952) 195 F. 2d 872, cert. den. 344 U.S. 818. The wisdom of the hearing requirement is demonstrated here.

The court below adopted the reasons assigned by the Commission for its summary rejection of Petitioner's certificate application. It concluded that rejection without hearing was proper where there was an operative certificate duplicating the one for which Petitioner had applied. *If the view of the Court and Commission is correct that the certificate is not limited by the language of the application, the question of "duplication" is clearly one for determination after hearing.*

Petitioner was denied the opportunity to show that the "outstanding" certificate (upon which the Court below based its decision) was inoperative; that by its own terms it did not cover the same proposed sale of gas to Southern Natural; that the scope of the second contract was distinctly different from that of the expired agreement; that it was *in fact* for new sales (or service) at the agreed initial rate; that termination of deliveries under the expired contract had lawfully brought the first certificate to a conclusion; and that a new certificate application was, therefore, not only proper, but was required by the Act. Petitioner was further deprived of the right to show the *fact* that all facilities which he employed and operated in producing the gas and effecting the contract deliveries were "production facilities" exempt from the abandonment limitations of Section 7.

The Commission, apparently having assumed that the hearing could result only in adverse findings to Petitioner, ordered summary rejection. The dissent of Commissioner Digby, suggest only one of several salient matters of fact

and issues of construction which the Commission would be called upon to consider — matters properly presented first to the Commission. Rejection without hearing prevented Petitioner from making a full record on his application. Unless this Court corrects, the procedure adopted by the Commission and sanctioned by the majority below may be expected to replace that guaranteed by the Act.

CONCLUSION

This Court has long held that the power to compel continuity in a business can arise only where the obligation of continued service by the owner is direct and is assumed when the business is entered upon. *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522 (1923). Under the opinion below Petitioner is charged with the burden of continuing production and sales of gas to Southern Natural from his Gwinville Field properties *ad depletum productae*. His contract is ignored. The general applicability of this decision and its misapplication of Section 7 of the Act require full review by this Court. It is, accordingly, urged that a writ of certiorari be issued to review the judgment of the Court below.

Respectfully submitted,

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